

KEYNOTE ADDRESS: A COMMUNITY OF REASON AND RIGHTS*

INTRODUCTION

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KEYNOTE ADDRESS

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DEAN TREANOR: I am delighted that this Symposium is being held here at Fordham. I would particularly like to recognize Catherine Powell for the extraordinary job she has done in putting it together. It is just amazing. These are the most important issues that we, as lawyers and legal academics, face today. This is a conference that I think, overall, has two overarching themes in the various programs.

One is a separation of powers question: Which part of the government makes decisions about things like war and treaties? The other overarching theme is, how does the question of constitutional interpretation intersect with international law?

We have had law schools in this country for more than two hundred years. The most pressing issues change over time. But these are the most pressing issues today, and they are going to be the most pressing issues for all of our lifetimes. Partly, that is because of globalization and the fact that the intersections between nations are at a level that was inconceivable a short time ago. Part of it is because, in the wake of 9/11, we have a whole series of questions concerning the war on terrorism and relations between foreign states, which are at a level of great urgency. So these are the most important questions that we have.

Catherine and all of you have put together a program that brings together the most extraordinary speakers. It is really jaw-dropping for me to look at all of the people who will be appearing here today and tomorrow. Our keynote speaker is foremost among them: Harold Koh. There are just a couple of things that I want to say about Dean Koh before I turn matters over to him.

* This is a lightly edited and footnoted version of the Keynote Address that was delivered on October 4, 2007, at Fordham University School of Law.

First, of the 184 deans of American law schools, Harold is my favorite. I think, frankly, all of us can probably say that. He is my favorite, in part, not just because he is this great world human-rights champion, but also for reasons that are totally family-related. Harold's father-in-law, Bill Fisher, was a very distinguished graduate of Fordham Law School who went on to a terrific career in business and who really embodied the Fordham ideals. Fordham always meant very much to him. Harold is very much a part of the Fordham Law School family. He wears the Fordham Law School tie.

Secondly, our Leitner Center, which Tracy Higgins and Martin Flaherty started originally as the Crowley Program, is one of our cosponsors. It has gone to warp speed in the last few years with the help of Jim and Sandra Leitner. Jim Leitner and his father were reading *Storming the Court*,¹ which is the story of how a group of remarkable Yale law students, including our own Catherine Powell, brought suit against the United States government concerning the treatment of Haitians trying to come to the United States. Harold Koh, as a young law professor, was the pivotal figure in moving this forward. Jim Leitner said, "We should be doing this at Fordham," and gave us a \$1 million grant to start a clinic like that. So I have very personal reasons, in terms of Fordham governance, to be grateful to Dean Koh.

Third, and the reason why you all are here, is because he is somebody of vision and a leader in the human rights area who is really without peer. I can testify to that from personal experience. My first job as an attorney after I clerked was to work in the Iran-Contra Special Prosecutor's Office. One of the things I was trying to figure out was why what Oliver North and others had done violated the law and was inconsistent with the constitutional framework.

Twenty years ago, there had not been a lot of careful thought about these issues. What I found—and I did a lot of the basic background work in framing a conspiracy charge—was that there had been interference with normal government operations. The Bible, for me, was Harold's book, *The National Security Constitution*²—the most remarkable, the most thoughtful, the most careful, serious, and deeply committed work of scholarship in the area. It was fabulous. I still, more than twenty years later, think of it as the absolute model of committed and flawless scholarship.

Since that time, I have followed Harold's career. When I was at the Office of Legal Counsel, where I had the privilege of working with Martin Lederman, a remarkable and brilliant attorney who was on our last panel, we had the privilege of working with Harold when he was the Assistant Secretary of State for Human Rights. What he did there was breathtaking. It was government service of the highest order. He is someone who is so profoundly committed to the cause of human rights and to getting the

1. BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUE THE PRESIDENT—AND WON* (2005).

2. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

United States on the right side of the crusade for human rights that he was an inspiration to all of us.

I introduce a lot of people here. I have never had a greater privilege than introducing Harold Hongju Koh.

DEAN KOH: Thank you, Dean Bill Treanor. You are not only a dear friend, but also one of the most outstanding law deans of America. We are very lucky at Yale Law School; remarkably, six of the law deans in New York happen to be graduates of our school: Brooklyn, Columbia, CUNY, Fordham, Hofstra, and NYU. All of these wonderful deans are good friends of mine, but nobody more regularly impresses me, with his passionate commitment to scholarship and humane legal education, than Dean Bill Treanor.

As Bill said, I last came to this room to give the Levine Lecture, which was around the time of my late father-in-law Bill Fisher's fiftieth anniversary of graduating from Fordham Law School, and so I dedicated that lecture to him. Bill Fisher attended Fordham Law at night while working downtown at a business; he later became president of Universe Tankships. He had tremendous loyalty and affection for this school. He had the privilege of going with members of his law school class down to Washington to be sworn into the Supreme Court bar, accompanied by then-Judge, formerly Dean, Bill Mulligan of the Second Circuit. He often described that day to me as one of his happiest days ever as a lawyer, so I feel delighted to be here, remembering him today.

As I look over this crowd, I see so many friends from Fordham's law faculty—Justice Richard Goldstone, and Professors Marty Flaherty, Tracy Higgins, Gráinne de Búrca, and, most of all, my former student Catherine Powell, who has done such an extraordinary job both in building up the Leitner Center and in putting on this terrific conference. So I feel very good looking out over this crowd and seeing all my friends.

This conference asks how to set the terms of engagement between international law and the Constitution. As Dean Treanor said, that topic encompasses two issues: first, enforceability of international and foreign law in U.S. courts; and second, the extent to which international law binds the President in the war on terror.

My keynote remarks today are entitled "A Community of Reason and Rights." I would like to take as my touchstone the now-famous quote by Chief Justice John Roberts from his Supreme Court confirmation hearing: "[L]ooking at foreign law for support [in construing the U.S. Constitution] is like looking out over a crowd and picking out your friends. You can find them, they're there. And that actually expands the discretion of the judge. . . I think that's a misuse of precedent, not a correct use of precedent."³

3. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 200–01 (2005) (statement of Judge John G. Roberts), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:23539.wais.

A few months later, at his confirmation hearings, Justice Samuel Alito was asked the same question. He similarly said,

I don't think that it's appropriate or useful to look to foreign law in interpreting the provisions of our Constitution. I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world. . . . The framers did not want Americans to have the rights of people in France or the rights of people in Russia or . . . Europe They wanted them to have the rights of Americans.⁴

In response, I am reminded of a comment made recently by Aharon Barak, who is the president of the Israeli Supreme Court. He said, "What's wrong with looking out over a crowd and picking out friends? Should I look out over the crowd and pick out my enemies?"⁵

Ladies and Gentlemen, that, in a nutshell, is my thesis today. In this crowd I see many friends who are on the panels today and tomorrow. I don't agree with all of you all the time, or even most of the time; your views do not control mine. But I learn from you. I gain value from your insights. I listen to you. I incorporate your insights to improve my reasoning. I do not simply ignore what you have to say or act as if it is irrelevant to my own decision-making process. Why? Because you are all part of what I would consider to be a community of reason and rights that I must engage if I plan to discuss a subject like this responsibly. On reflection, I believe, that position completely answers the two Justices and other commentators who take the opposite position. To explain why, let me divide my remarks into four parts:

First, what is the state of the debate about international and foreign law in U.S. courts? What is and what is not contested? Second, if this debate is primarily about legitimacy, what are the four perspectives on legitimacy that we must address? Third, I would like to explain my proposed standard—looking to a community of reason and rights. Finally, I will apply that standard in a way that I think cuts the Gordian knot of legitimacy.

At bottom, this lecture rests on two simple ideas: First, that there is nothing inherently wrong with looking out over a crowd of ideas and picking out our friends. Of course, you should not be bound by their views, but neither should you ignore them. Second, what makes looking to foreign and international law a legitimate activity for domestic judges is that they are not selectively looking at those foreign and international precedents to help them reach a particular desired preordained outcome. The question is

4. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006) [hereinafter *Alito Confirmation Hearing*] (statement of Judge Samuel A. Alito), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:25429.wais.

5. Aharon Barak, President, Israeli Supreme Court, Address to Students at Yale Law School (Sept. 28, 2007). Aharon Barak's address was not recorded or transcribed.

whether, in choosing between two possible legal positions, either of which is a plausible interpretation of a constitutional provision, a judge should look to a legal analysis founded in a community of reason and rights to see whether there is a position that would better inform his or her constitutional interpretation. If such a clear position exists, it is not illegitimate for the judge to follow it. Far from it, informing one's judgment by looking to those other bodies of learning is exactly how a prudent judge should proceed.

So let me ask first: What is not contested in this debate? A lot of scholars have written about this subject, and many of the justices have now talked about it. What is not contested is that U.S. courts have historically looked to international and foreign law in construing the Constitution. There is just too much history and case citation that can be marshaled to establish this point, although the courts have not found such foreign precedent to be binding in most cases. Better known to many of you are the famous recent cases in which the U.S. Supreme Court has cited foreign law in its opinions: for example, *Atkins v. Virginia*,⁶ declaring unconstitutional the execution of a mentally retarded prisoner; *Roper v. Simmons*,⁷ which declared unconstitutional the attempted execution of a person who was under eighteen at the time of committing his offense; and *Lawrence v. Texas*,⁸ which invalidated same-sex sodomy criminal laws in the state of Texas. At the same time, the Court has also had a number of cases recently involving international law—most prominently, two 9/11 cases, the *Hamdi* case⁹ and the *Hamdan* case¹⁰—and three cases involving the relationship between domestic courts and the International Court of Justice—the *Medellín* case,¹¹ *Sanchez-Llamas*,¹² and *Medellín II*.¹³ So like it or not, U.S. courts have long looked to international and foreign law when conducting constitutional interpretation.

Second, also not contested is the hierarchical place of treaty law within the domestic legal hierarchy: below the Constitution, above state law, and at the same level as federal statutes. It undeniably would be a violation of the separation of powers for Congress to forbid judges from citing foreign and international law in their opinions, as they sought to do in the now-infamous Feeney Amendment.¹⁴ So bravo to Justice Scalia, who said that such an amendment would be flatly unconstitutional, despite his strong

6. 536 U.S. 304, 316–17 n.21 (2002).

7. 543 U.S. 551, 577 (2005).

8. 539 U.S. 558, 573 (2003).

9. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

10. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

11. *Medellín v. Dretke*, 544 U.S. 660 (2005) (per curiam).

12. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

13. *Medellín v. Texas*, Nos. 06-984, 08-5573, 08-5574, 2008 WL 3821478 (U.S. Aug. 5, 2008) (per curiam).

14. Reaffirmation of American Independence Resolution, H.R. Res. 568, 108th Cong. (2004) (seeking to restrict references to foreign law in interpreting federal law). The bill was reintroduced in the House the next year. See H.R. Res. 97, 109th Cong. (2005).

personal opinion that he himself does not believe it is proper to cite foreign and international law in constitutional interpretation.

If these are the uncontested issues, what issues are contested? Let me mention three: First, the hierarchical place of customary international law in U.S. domestic law. That has been the subject of a long-standing debate between the so-called "New Sovereignists," including Jack Goldsmith and Curtis Bradley, and myself, Gerry Neuman, now of Harvard, and Lou Henkin of Columbia Law School. Second, is the citation of foreign and international law somehow undemocratic because it expands judicial discretion, as Chief Justice Roberts has asserted? And third, if a judge does want to cite foreign and international law, what standards should she apply to make this practice legitimate?

This conference addresses the legitimacy of this practice. Let me offer four different perspectives on legitimacy: a comparative perspective, a historical perspective, a constitutional perspective, and a jurisprudential perspective. These perspectives should give you some sense of why it is reasonable to look out over a crowd and listen to friendly ideas, particularly if they belong to a common community of reason and rights.

First, let me explore the comparative perspective. Recently I have discussed this issue with four famous foreign supreme court justices: Richard Goldstone, a founding judge of the South African Constitutional Court; Aharon Barak, the President of the Israeli Supreme Court; Dieter Grimm of the Federal Constitutional Court of Germany, now a professor at Humboldt University; and Rosalie Abella, currently sitting on the Supreme Court of Canada. To each of these judges, I asked the same question: "Do domestic judges in your country apply foreign and international law?" In response, they all said, "We do it every single day. We do not even think about it as controversial. We are amazed that Americans are so worked up about what in our country is a nonissue."

On reflection, part of the reason that this practice is so uncontroversial abroad may lie in the constitutional provisions of different countries' constitutions, some of which have textual provisions for incorporating international law into domestic law. Recently I saw Veton Surroi, a member of the Unity Team of Kosovar Albanians that is negotiating in New York regarding Kosovo's final status. Surroi is an extraordinarily articulate person, the former editor of the Pristina newspaper *Koha Ditore*. As most of you know, Kosovo would like very much to become the world's 193rd nation. When I was in the U.S. State Department, Veton and I both participated at the Kosovo status negotiations in Rambouillet in 1999. When I heard him talk about the search for Kosovo's independence, I asked Surroi whether the Kosovars would issue a declaration of independence from the former Yugoslavia. He said to me, "Many of us will draft the declaration of independence. There will be no single Thomas Jefferson." But tellingly, he said, echoing the words of our own 1776 Declaration of Independence, "We plan to give 'decent respect to the opinions of mankind'

and declare fealty to international law and human rights as our first step toward gaining international acceptance for our new country.”

In doing so, the Kosovars would follow in the steps of the 192nd country in the world, Timor-Leste, also known as the government of East Timor. When Timor-Leste joined the United Nations in 2002, the first thing the country did was sign the Universal Declaration of Human Rights. In his maiden speech to the United Nations General Assembly, President Xanana Gusmão said, “We are aware that we will be serving the interests of our people only if we honor our international commitments by signing the relevant conventions and treaties which safeguard our sovereignty and our interests.” In other words, new nations joining the brotherhood of nations tend to invoke the consistency of their domestic law with international law as a way of gaining international respectability.

For example, take John Jay, the first U.S. Chief Justice, former ambassador to France, who says, in *Chisholm v. Georgia* that the United States had, by “taking a place among the nations of the earth, become amenable to the law of nations.”¹⁵ Former Secretary of State John Marshall said, in 1815, that absent a contrary statute, “the Court is bound by the law of nations which is a part of the law of the land.”¹⁶ In *McCulloch v. Maryland*, Marshall famously said that “we must never forget that it is a constitution we are expounding.”¹⁷ But he added: “If any one proposition could command the universal assent of mankind, . . . it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action.”¹⁸ In other words, in construing the fledgling U.S. Constitution, the Justices were making reference to principles that might command “the universal assent of mankind.” In an interdependent world, these Justices were saying, the United States must pay decent respect to the opinions of mankind in construing our own law. By the turn of the nineteenth century, Justice Horace Gray had announced that “when . . . there is no written law upon the subject, the duty still rests upon the judicial tribunals [to] ascertain[] and declar[e] what the law is”—including international and foreign law—“whenever it becomes necessary to do so.”¹⁹ That very language is quoted again by Justice Gray in his famous opinion in the *Paquete Habana* case.²⁰

So what was the “originalist” vision of international law that these justices were talking about? The notion was compliance with what the Romans called *jus gentium*, a law common to all mankind. Professor Jeremy Waldron of NYU, in an article in the *Harvard Law Review* several years ago, describes the *jus gentium* as “the common law of mankind, not

15. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).

16. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

17. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

18. *Id.* at 405 (emphasis added).

19. *See* *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

20. 175 U.S. 677, 714 (1900) (“[I]t is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful, and without probable cause . . .”).

just on issues between sovereigns but on legal issues generally It was . . . a sort of consensus among judges, jurists, and lawmakers around the world”²¹—by which he means a community of reason and rights—regarding legal rules.

To see that the first Justices applied an American jurisprudence based on reason and rights, look to William Blackstone, whose *Commentaries* describe the law of nations as “a system of rules, deducible by natural reason, and established by universal consent . . . to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.”²² In other words, what Blackstone describes is not an inter-national law—a law between states, in the strict Benthamite sense—but rather, a kind of transnational law for a modern time.

What about our constitutional history and doctrine? Professor Sarah Cleveland’s recent article, *Our International Constitution*, in the *Yale Journal of International Law* thoroughly reviews the doctrine to describe how the Supreme Court has used international law traditionally to construe the Constitution in three ways: first, direct incorporation; second, as a background principle of constitutional construction; and third, to construe individual rights provisions of the Constitution.²³

So the point that should emerge from this comparative and historical look is that use and reference to international and foreign law in constitutional interpretation is not only a settled practice in most parts of the world, but was also a settled practice in the United States until quite recently.

Given this long history, what explains the intense “legitimacy anxiety” about the application of international and foreign law here in America? Why this national amnesia about our settled historical practice?

Let me suggest six reasons: First, the continuing interpretive debate over originalism as a way of construing the Constitution. Second, a broader societal debate after *Brown v. Board of Education*²⁴ about the appropriate judicial role and what Alexander Bickel famously called “the countermajoritarian difficulty.”²⁵ Third, a debate over what has been called “American exceptionalism,”²⁶ the idea that because America is an exceptional country, it need not follow the same rules as everybody else. Fourth, concerns that judicial constraints on the executive power will inevitably subject us to problems and danger in the war on terror. Fifth, the fear that on certain hot-button issues, like same-sex sodomy or the death

21. Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 132 (2005).

22. 4 WILLIAM BLACKSTONE, COMMENTARIES *66.

23. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 12–87 (2006).

24. 347 U.S. 483 (1954).

25. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962).

26. See Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1481 n.4 (2003).

penalty, foreign and international law will be used by judges as an illegitimate “tiebreaker,” in a way that will allow them to impose their values on a voting population. Finally, a jurisprudential objection—that judges cannot find international values because those values do not exist, except in the judges’ own minds. Let me review and, in the end reject, each of these objections.

First, the originalist objection: If originalists say that the only source to which a judge is permitted to look is the Framers’ original intent, then in theory, you are not allowed to look to any sources that were not part of the original interpretation. But here is the catch: If the Framers themselves originally looked to foreign and international sources, then why does looking to foreign and international sources pose a problem even for originalists? It is surely strange to suggest that originalism somehow bars judges from looking to anything other than the constitutional text, when, in fact, the original Founders themselves, of course, looked to all kinds of sources other than the text, including foreign and international law sources.

Second, what about the countermajoritarian difficulty? Here, the argument goes, if judges place their fundamental values into the Constitution through judicial interpretation, they effectively override the will of elected officials. But there is a democratic deficit that judges face whether they are citing to international and foreign law or whether they are just interpreting the Equal Protection Clause of the Constitution to say that equal treatment does not mean separate but equal. But on examination, what is countermajoritarian is not the judges; it is the Constitution! The Constitution by its nature is countermajoritarian, particularly when it protects individual rights from being overridden by the will of the majority. Judicial review to protect these individual rights is countermajoritarian. And *Marbury v. Madison* makes clear that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”²⁷ So long as the source of values that judges use to construe the Constitution is rooted in legal principle, not personal preference, it is not clear why we face any countermajoritarian problem in using those values to construe the Constitution. What causes a countermajoritarian problem is if judges choose to construe the Constitution based on personal preference and not based on law.

The real complaint is therefore that allowing judges to construe the Constitution in light of foreign law has the potential to elevate foreign law into a higher place within the lexical hierarchy of American law than it is entitled to occupy, above federal statute and above legislative change. But the Supreme Court’s decision in *Sosa v. Alvarez-Machain*,²⁸ makes clear that customary international law is indeed federal common law. Although there are some recent—and I believe incorrect—articles on the subject that

27. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

28. 542 U.S. 692 (2004).

offer a dramatic misreading of the *Sosa* case,²⁹ in my view, the correct reading of *Sosa* was recently offered by Judge William Fletcher of the U.S. Court of Appeals for the Ninth Circuit, who observed: “[From *Sosa*], we know—because the Supreme Court has told us—that there is a federal common law of international human rights based on customary international law.”³⁰

Take the third objection, based on American exceptionalism, a topic on which I have recently written.³¹ Here the basic claim is that the United States, as the world’s most powerful nation, cannot be constrained by law made by countries like Zimbabwe. You cannot take a poll of nations, said Justice Alito in his confirmation hearing.³² These countries, some would say, claim to care about human rights, but follow them only in name. If we started citing to foreign law, it would be only a matter of time before our human rights standards were driven down to the lowest global common denominator.

But this argument ignores an important difference between recognizing a “margin of appreciation” for American interpretation of international standards and a distinctly American interpretation that pushes counterproductive double standards. No one objects to an American court respecting the United States’ distinctive legal culture by recognizing a margin of appreciation for American constitutional rules, for example, in the First Amendment’s high protection of hate speech. What becomes problematic is not the margin of appreciation, but the creation of a genuine double standard. Only when there is a distinctly American interpretation that creates a double standard that places the United States on the lower rung does that lower interpretation conflict with universal principles of human rights.

What about the fourth concern, regarding the war on terror? A new book called *The Terror Presidency*³³ by Jack Goldsmith, my friend, former student, and teaching assistant, describes his extremely admirable recent behavior as a lawyer in the Bush administration. Under intense political pressure, Jack Goldsmith stood up for the rule of law against the White House Counsel, the White House Chief of Staff, and the Vice President’s lawyer. As head of the U.S. Justice Department’s Office of Legal Counsel, Goldsmith, Deputy Attorney General Jim Comey, and Attorney General John Ashcroft resisted as illegal a wiretap program that seemed squarely in violation of enacted foreign intelligence surveillance law. For all of these courageous actions, Professor Goldsmith deserves full credit.

29. See, e.g., Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

30. William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 664 (2007).

31. E.g., Koh, *supra* note 26.

32. See Alito Confirmation Hearing, *supra* note 4, at 471.

33. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

But elsewhere in his book, there are some puzzling images. Take chapter two, for example, which is entitled “The Commander-in-Chief Ensnared by Law.” Goldsmith suggests that we cannot have our Commander-in-Chief “ensnared” by law—overlooking the fact that he happens to be Commander-in-Chief only *because of the law*. At another point he writes,

Globalization and a more conservative Supreme Court motivated many in the academic American left to replace the U.S. Constitution with international human rights as the fount of progressivism. In the past quarter century, various nations, NGOs, academics, international organizations, and others in the “international community” have been busily weaving a web of international laws and judicial institutions that today threatens [U.S. government] interests. . . . Unless we tackle the problem head-on, it will continue to grow. The issue is especially urgent because of the unusual challenges we face in the war on terrorism.³⁴

Although Jack Goldsmith was plainly right in resisting the extreme excesses of the Bush administration, that does not mean that all of his legal views are correct. Let’s look at two recent Supreme Court cases: in the *Hamdi* case (in a separate opinion by Justice David Souter)³⁵ and in *Hamdan v. Rumsfeld*, the Court invoked international law to reject the government’s claims that detainees are persons outside the law who can be held in an extralegal zone called Guantánamo, who could be subjected to the jurisdiction of a noncourt, known as a military commission.³⁶ In *Hamdan*, the Court found that the process provided fell short of the international due process standards set forth in Common Article 3 of the Geneva Conventions.³⁷ *Hamdan* treated as universal a binding treaty obligation in Common Article 3.³⁸

In both cases, the U.S. government tried to argue that a clear dichotomy exists between law and war. If we are in a war on terror, the government seemed to suggest, “What’s law got to do with it?” When we are at war, law somehow goes out the window. But what this overlooks is that there is no law/war dichotomy. There is an *international law of war* that has existed for quite a while. And, as Justice Anthony Kennedy put it in *Hamdan*, “If the military commission at issue is illegal under the law of war, then an offender cannot be tried ‘by the law of war’ before that commission.”³⁹ In short, if you are going to invoke war as a rationale for your authority, you must take the bitter with the sweet and accept the law of

34. *Id.* at 60.

35. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539–54 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

36. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 (2006).

37. *See id.* at 2794–98; *see also* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

38. *Hamdan*, 126 S. Ct. at 2798 (“Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless.”).

39. *Id.* at 2802 (Kennedy, J., concurring in part).

war as a constraint as well.⁴⁰ Shortly after the *Hamdan* case came down, I went to testify before the Senate Judiciary Committee. A senator said, “The last time I checked, the terrorists had not signed Common Article 3 of the Geneva Conventions.” I responded, in effect, that the last time I had checked, the whales had not signed the Whaling Convention either! We should understand that Common Article 3 of the Geneva Conventions is not about them and who they are. It is about us and who we are. Common Article 3 is not so much a contract, as it is a minimal universal standard regarding humane treatment—affecting how we treat people we detain and, more fundamentally, how we are obliged to treat detainees when we act within a community of reason and rights.

A fifth objection to the legitimacy of using foreign and international law concerns “hot-button” social issues. The core claim is that American Justices cannot use international and foreign law as tiebreakers to reach legal conclusions that comport with their own policy preferences, for example, with regard to the death penalty or same-sex sodomy. But it is not at all clear that international and foreign law are in fact being used as such a tiebreaker. For example, look at *Roper*, where, by a vote of 5-4, the majority said that the Eighth and Fourteenth Amendments forbade the execution of offenders who were under eighteen at the time of the offense.⁴¹ Significantly, the Court did not say that it was breaking the tie by looking to foreign and international law. Instead, the Court said that it was interpreting the Eighth Amendment in light of prevailing American practice,⁴² which

finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. *This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. . . .*

. . . .

*. . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.*⁴³

In short, in looking to foreign and international practice, the Court is not seeking to use that practice to break a tie; it is only seeking confirmation in the practices of others for a trend that it has found already developing within the United States.

The sixth and final—the jurisprudential—objection asserts that foreign and international law cannot be cited in a principled way. But surely the

40. *See id.*

41. *Roper v. Simmons*, 543 U.S. 551 (2005).

42. *See id.* at 564–67 (explaining that the “evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded”).

43. *Id.* at 575, 578 (emphasis added).

same could be claimed about any circumstance where a judge applies choice of law rules to any choice of law situation. In nearly all such cases, judges apply legal rules from other jurisdictions to bind citizens of their own jurisdiction. All other things being equal, choice of law rules help to ensure that judges will decide like cases alike, unless local necessity or public policy demand otherwise. This is especially true when U.S. law does not stand alone, but increasingly (with a margin of appreciation) forms part of a global body of international human rights law. At base, there is nothing illegitimate about choosing a legal interpretation that is consistent with human rights law, so long as judges adopt such interpretations through a process of transparent legal reasoning that seeks to determine whether there is a clear and genuine consensus within a community of reason and rights as to what the global norm is.

There can be little doubt that this is a rapidly growing issue. In its last five Terms, the Supreme Court has had nearly two dozen cases involving international and foreign law issues, in a whole range of areas—9/11,⁴⁴ the Alien Tort Claims Act,⁴⁵ foreign sovereign immunity,⁴⁶ extraterritoriality,⁴⁷ immigration,⁴⁸ NAFTA,⁴⁹ federal criminal statutes,⁵⁰ the death penalty,⁵¹ the Vienna Convention on Consular Relations,⁵² treaty issues,⁵³ and transnational discovery.⁵⁴ These cases are clearly not going away any time soon. These cases involve four kinds of judicial interpretation: interpretation of the Constitution, statutes, treaties, and customary international law. Statutory interpretation can either involve direct incorporation of international law into a statute—as in the case of the Alien Tort Claims Act, which by its own terms mentions “torts in violation of the law of nations,” and the Foreign Sovereign Immunities Act, which

44. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Munaf v. Geren*, 128 S. Ct. 2207 (2008), *reh'g denied*, No. 07-394, 2008 WL 3822186 (U.S. Aug. 18, 2008); *Hamdan*, 126 S. Ct. 2749; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

45. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

46. See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

47. See, e.g., *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

48. See, e.g., *Clark v. Martinez*, 543 U.S. 371 (2005); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005).

49. See, e.g., *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004).

50. See, e.g., *Small v. United States*, 544 U.S. 385 (2005); *Pasquantino v. United States*, 544 U.S. 349 (2005).

51. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005).

52. See, e.g., *Medellín v. Texas*, Nos. 06-984, 08-5573, 08-5574, 2008 WL 3821478 (U.S. Aug. 5, 2008) (*per curiam*); *Medellín v. Texas*, 128 S. Ct. 1346 (2008); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006); *Medellín v. Dretke*, 544 U.S. 660 (2005) (*per curiam*).

53. See, e.g., *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006) (United Nations Convention on Psychotropic Substances); *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (Warsaw Convention).

54. See, e.g., *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

mentions taking of property “in violation of international law”—or indirect incorporation through the time-honored *Charming Betsy* principle.⁵⁵

I have argued in a number of places that we are now seeing a Supreme Court that is divided between two judicial camps: the transnationalists and nationalists.⁵⁶ The swing Justice, as he seems to be on everything, is Justice Kennedy. What are the key differences between the judicial philosophies of these two groups?

- Transnationalist judges tend to look to U.S. interdependence, whereas nationalist judges tend to look to U.S. autonomy.
- Transnationalist judges think about how U.S. law fits into a framework of transnational law, while nationalists see a rigid foreign and domestic divide.
- Transnationalist judges think that courts can domesticate international law, whereas nationalists think that only the political branches are legally empowered to do so.
- Transnationalist judges look to the development of a global legal system, while nationalists tend to focus more narrowly on the development of a national legal system.
- Transnationalist judges believe that executive power can be constrained by comity amongst the courts, while nationalists believe acts of executive discretion enjoy great deference.

The transnational tradition in American jurisprudence is a strong and enduring one. It runs through Chief Justices John Marshall and John Jay, whom I have mentioned; through Justice Horace Gray, who wrote the *Paquete Habana* case and *Hilton v. Guyot*;⁵⁷ through Chief Justices Melville Fuller and William Howard Taft, who helped to found the American Society of International Law; to Justice William O. Douglas, who traveled the world to an extent unmatched by any current justice; to Justice William Brennan, who was a strong internationalist on the Warren Court; to Justice Byron White, who wrote a stirring transnationalist dissent in the *Sabbatino* case;⁵⁸ to Justices Stephen Breyer and Ruth Bader Ginsburg today, joined by Justices John Paul Stevens and David Souter, and at times by Justice Anthony Kennedy and, when she sat on the Court, Justice Sandra Day O'Connor; and to the Justice for whom I had the privilege of clerking, Harry Blackmun, who articulated an important transnationalist canon for U.S. judges. Recall the *Charming Betsy*'s transnationalist canon of statutory interpretation: when you have two possible ways to interpret an

55. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 67 (1804) (“[I]t has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

56. See, e.g., HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* 347–60 (2008).

57. 159 U.S. 113 (1895).

58. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439–72 (1964) (White, J., dissenting).

act of Congress, you should construe it to be consistent with international law, if at all possible.⁵⁹ In other words, if there are two possible interpretations of a statute, and one comports with international law, that is the one that you should follow. The canon follows from the self-evident point that deliberately adopting a statutory interpretation that is inconsistent with international law assumes that Congress legislated with an intent to bring our law into conflict with that of other nations.

In his judicial opinions, Justice Blackmun suggested a broader transnational canon for the age of globalization that potentially covers the Constitution as well. In the *Aérospatiale* case, he suggested that domestic courts should look beyond the United States' immediate interests to the "mutual interests of all nations in a smoothly functioning international legal regime,"⁶⁰ urging judges

to consider if there is a course that furthers, rather than impedes, the development of an ordered international system. A functioning system for solving disputes across borders serves many values, among them predictability, fairness, ease of commercial interactions, and stability through satisfaction of mutual expectations. These interests are common to all nations, including the United States.⁶¹

What this suggests—and this is my proposed canon—is that when a U.S. judge is faced with an interpretive question regarding a provision of the Constitution, he or she should construe the provision in a manner most consistent with the modern *jus gentium*, which is a clear consensus of a legal community of reason and human rights.

Let me give three examples. History suggests that over the years, the Court has regularly looked to foreign and international precedents as an aid to constitutional interpretation in at least three situations, which for simplicity's sake I have elsewhere called "parallel rules," "empirical light," and "community standards."⁶² First, the Court has noted when American legal rules seem to parallel those of other nations, particularly those with similar legal and social traditions. As the Court has repeatedly recognized, the concept of "ordered liberty" is not uniquely American but, rather, is "enshrined" in the legal history of "English-speaking peoples," as well as other legal systems.⁶³ In *Lawrence*, the Supreme Court acknowledged that

59. *The Charming Betsy*, 6 U.S. (2 Cranch) at 67.

60. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

61. *Id.* at 567 (citation omitted) (internal quotation marks omitted).

62. See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 45 (2004), on which the discussion that follows is based.

63. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949)); *Miranda v. Arizona*, 384 U.S. 436, 488 n.59, 521–22 (1966) (quoting from a 1954 decision by the Lord Justice General of India and citing experiences in other countries); *Quinn v. United States*, 349 U.S. 155, 167 (1955) (finding a practice "supported by long-standing tradition here and in other English-speaking nations"); *Rochin v. California*, 342 U.S. 165, 169 (1952) (writing that the Due Process Clause obliges courts to ascertain whether a given law or practice offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples"). More recently,

the concept of privacy is not American property, unique to the United States, but rather, part of a privacy concept recognized and shared in other countries in the world.⁶⁴ In asking a question under U.S. law—whether there is a compelling governmental interest in preventing people from having sex with same-sex partners—the *Lawrence* Court found that the claimed compelling governmental interest had not been found elsewhere, in countries with whom we arguably shared a common heritage of privacy.

Second, as Justice Breyer recently noted, the “Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances.”⁶⁵ In *Printz v. United States*, he elaborated, “Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. *But their experience may nonetheless cast an empirical light* on the consequences of different solutions to a common legal problem”⁶⁶ In effect, Justice Breyer asks, If somebody else has considered a constitutional question before, why shouldn’t U.S. courts look to what those countries have decided to determine whether or not the sister country’s solution has led to a good outcome? Again, this is looking out over a crowd and doing what your smart friends do.

Third, the Court has looked outside the United States when an American constitutional concept, by its own terms, implicitly refers to a *community standard*—e.g., “cruel and *unusual*,” “*due process of law*,” “*unreasonable searches and seizures*.” In such cases, the Court has recognized that the United States is not the only relevant community to be consulted. For example, in deciding whether a particular punishment has become both “cruel and unusual,” the Court has long taken notice of foreign and international practice to evaluate how “unusual” the practice has become.⁶⁷ In *Trop v. Dulles*, the Court specifically held that the Eighth Amendment to the U.S. Constitution contains “evolving standards of decency that mark the progress of a maturing society.”⁶⁸ And in subsequent cases, the Court made clear that this “evolving standard” should be measured by reference not just

the Court has spoken more broadly about “civilized societies,” without regard to the particular language they may speak. *See, e.g., Ford v. Wainright*, 477 U.S. 399, 409 (1986) (noting “the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity”).

64. *Lawrence v. Texas*, 539 U.S. 558, 572–73, 576–77 (2003).

65. *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting).

66. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (emphasis added) (citations omitted).

67. For a catalogue of decisions, see generally Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1118–19 & n.140 (2002).

68. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

to maturing American experience, but to foreign and international experience as well.⁶⁹

What are the “evolving standards of human decency” to which *Trop v. Dulles* refers? My suggestion would be to look to the global community of reason and rights in determining whether a particular practice of punishment may now be deemed to be “unusual.” For example, in an amicus brief we submitted in the *Atkins* case about the execution of persons with mental retardation, we pointed out that only certain states of the United States and Kyrgyzstan executed persons with mental retardation.⁷⁰ The next day, the *New York Times* printed a letter to the editor from the ambassador of Kyrgyzstan, pointing out that his country had actually placed a moratorium on the death penalty.⁷¹ That meant that only certain states of the United States continued to have this form of punishment on the books, and that even fewer states of the United States actually ever executed persons with mental retardation. I would submit that, in a world of more than 190 countries, if only part of one country persists in a particular punishment, that punishment is “unusual,” and perhaps even “cruel and unusual,” which would render it a violation of the Eighth Amendment, which is what the Court held in *Atkins*.

In conclusion, let me suggest that if judges follow the transnationalist canon that I suggest, based on a notion of a community of reason and rights, it cuts the Gordian knot. It answers all six “legitimacy” objections to the use of foreign and international law that I have enumerated above.

First, take originalism: As the late John Hart Ely recognized, originalism must mean more than simply following tradition. As Ely wrote, “[I]n this country . . . there are all sorts of traditions. . . . Lynching is a tradition. . . . Keeping blacks from voting is a tradition.”⁷² Just because a practice is a tradition does not mean it is always part of our Constitution. Originalism does not oblige us to follow traditions that don’t meet the highest standards of mankind, which is what the Framers more broadly intended. Thus, in

69. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (plurality opinion) (evaluating whether death penalty for fifteen-year-old offenders violates Eighth Amendment’s “civilized standards of decency” in part by looking to the prohibition of the execution of minors by the Soviet Union and nations of Western Europe); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (“[T]he doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (finding international practices regarding death penalty for rape relevant to its “evolving standards” analysis).

70. See Brief of Amici Curiae Diplomats Morton Abramowitz et al. in Support of Petitioner, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), 2001 WL 648607. The amicus brief was later refiled in *Atkins v. Virginia*. See Joint Motion of All Amici in *McCarver v. North Carolina*, No. 00-8727, to Have Their *McCarver* Amicus Briefs Considered in This Case in Support of Petitioner, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452), 2001 WL 1682012.

71. Baktybek Abdrysaev, Letter to the Editor, *Penalties in Kyrgyzstan*, N.Y. TIMES, June 30, 2001, at A14 (“[I]t is the policy of [Kyrgyzstan’s] executive branch not to impose the death penalty for any crime or in any circumstance.”).

72. JOHN HART ELY, ON CONSTITUTIONAL GROUND 21 (1996).

applying the transnationalist canon, modern judges would be following originalist Justices, such as John Marshall and John Jay, who similarly construed constitutional principles in light of *jus gentium*, an originalism based on reason and rights. If you look again at Sarah Cleveland's article regarding the history of our courts' use of foreign and international law,⁷³ you will see that the transnationalist canon explains much of our doctrine; courts have traditionally used international law as a background principle of constitutional construction and as a background principle for construing individual rights provisions of the Constitution.

Second, what about the countermajoritarian difficulty? Some Americans may not like independent judges citing to judges from other countries or courts to determine the relationship between national and international norms. But does anybody complain when expert and independent U.S. central bankers, like Alan Greenspan or Ben Bernanke, engage in dialogue with other central bankers and the IMF to set international monetary standards? In both cases, there are rules in the international arena that the United States helps to shape and make. The concern about the democratic deficit is ameliorated by the dominant role that U.S. government officials play in making those rules. The question Americans tend to ask about U.S. monetary policy, which is heavily influenced by international monetary policy, is not whether those rules suffer from a democratic deficit, but whether those monetary rules reflect the thinking of a global community of reason and rights: namely, do they comport with an international rule of economic reason that adequately respects the rights of U.S. nationals?⁷⁴ Remember that the antimajoritarian difficulty results not from judicial review, but from the source of the values used to construe the Constitution, and whether they are rooted in personal preference or legal principle. If the Constitution is construed against a background of reason and rights, like other choice-of-law reasoning, it remains rooted both in judicial tradition and in legal doctrine that is sensitive to the compatibility of U.S. legal principles with international principles.

Third, does applying the transnationalist canon reduce concerns about American exceptionalism? Yes, but it leaves a margin of appreciation for distinctly American values and for those U.S. constitutional norms that are particularly embedded in U.S. values and traditions (e.g., greater tolerance

73. See generally Cleveland, *supra* note 23.

74. As Justice Breyer put it in his 2003 speech to the American Society of International Law,

[T]he transnational law that is being created is not simply a product of treaty-writers, legislatures, or courts. We in America know full well that in a democracy, law, perhaps most law, is not decreed from on high but bubbles up from the interested publics, affected groups, specialists, legislatures, and others, all interacting through meetings, journal articles, the popular press, legislative hearings, and in many other ways. *That is the democratic process in action.*

Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Keynote Address at the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), in 97 AM. SOC'Y INT'L L. PROC. 265, 268 (2003) (emphasis added).

for hate speech). At the same time, the transnationalist canon would allow judges to construe the Constitution to invalidate domestic rules that now violate clearly established international norms, such as systematic race discrimination as an offense to equality. But in cases where there is no clearly established international human rights norm, for example, in the area of abortion, the canon simply would not apply.

Fourth, what about the war on terror objection? Here, one should ask what threatens our national interests more—when U.S. judges construe U.S. law according to international and foreign standards or when the United States presses an interpretation which is clearly a double standard, for example, applying practices of torture and cruel treatment in detention that do not comply with the Torture Convention or with Geneva Convention, Common Article 3? Here I am struck by Jack Goldsmith's final verdict on the Bush administration at the end of his book, *The Terror Presidency*: in the war on terror, President Bush

has been almost entirely inattentive to the soft factors of legitimation—consultation, deliberation, the appearance of deference, and *credible expressions of public concern for constitutional and international values* . . . [a]nd he has seen his hard power diminished . . . because he has failed to take the softer aspects of power seriously.⁷⁵

I agree entirely. But isn't that a reason why *judges*, and not just politicians, should be mindful of these international values, particularly when executive officials are not?

Fifth, what about the "illegitimate tiebreaker" argument? Again, a famous canon of statutory construction that we all know grew out of a famous concurring opinion by Justice Louis Brandeis in *Ashwander v. Tennessee Valley Authority*, which said that if there are two competing interpretations of a statute, one of which violates the Constitution, you must choose the constitutional interpretation.⁷⁶ That is, in effect, what the majority did in *Roper*. There were two possible interpretations. The Court found that the one that was most consistent with international and foreign norms confirmed their outcome.⁷⁷ The *Roper* majority chose the interpretation that comported with international and foreign norms, finding that those norms, "while not controlling our [legal] outcome . . . provide respected and significant confirmation for our own conclusions."⁷⁸

Sixth and finally, what about the jurisprudential objection, noted above, that a U.S. judge cannot find international human rights rules without imposing his or her own personal preferences? The Supreme Court effectively rejected this argument only a few years ago, in the *Sosa* case, where the majority instructed judges to look to "norm[s] of international

75. GOLDSMITH, *supra* note 33, at 215 (emphasis added).

76. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (citing *Light v. United States*, 220 U.S. 523, 538 (1911); *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 191 (1909)).

77. *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005).

78. *Id.* at 578.

character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized.”⁷⁹ This suggests that where international human rights rules are clear, they are fully capable of being found by U.S. judges, and they are doing so every day, in the context of Alien Tort Claims Act cases.

What about the “Zimbabwe objection”—that judicial reference to foreign and international norms will drive our law down to the lowest global common denominator? That is a bit like saying that the fact that we have federal minimum constitutional standards will drive every state of the Union down to the lowest available standard for rights. But as Justice Brennan noted in his famous article on state courts and constitutions and individual rights,⁸⁰ state courts always retain the freedom to maintain higher constitutional standards for their state, just as the United States remains free to construe our Constitution to give more protection under our Constitution for practices such as incendiary speech.

And what about Zimbabwe? On reflection, modern U.S. judges are no more obliged to follow Robert Mugabe than early American judges were obliged to follow the practices of the Barbary pirates. In the 1700s, the Barbary pirates neither satisfied *jus gentium* nor did their practices meet the standards of a global community of reason and rights. Today, neither do the practices of Mugabe. We do not have to construe our Constitution to descend to Zimbabwe’s level, if it is below our floor. Like state supreme courts in a federal system, the U.S. Supreme Court remains free in a global legal system to construe the U.S. Constitution, in light of our constitutional traditions, to require greater protections than the international human rights “floor” may require.

In conclusion, I have made three arguments. First, judicial interpretation of the Constitution in light of international and foreign law is nothing more or less than choice of law, guided by a canon of constitutional interpretation that I call the transnationalist interpretation. In choosing among two competing interpretations of a constitutional provision, a judge should construe the provision in a manner most consistent with a clear view of a global community of reason and rights, if such a view exists.

Second, in doing so, the judge is entitled to look over a crowd and pick out her friends. If your “friends” include persuasive law review articles written by publicists, that happens to be a subsidiary source of international law under Article 38 of the Statute of the International Court of Justice.⁸¹ If those sources are foreign and international decisions, or instruments of foreign law, it is not illegitimate to cite them, so long as they grapple with the issue within a framework of reason and rights and cast light on

79. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

80. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

81. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060.

community standards, parallel rules, or empirical lessons from other legal systems.

Third, notice that in seeking these other opinions, the judge is not asking her friends to decide the case! She is simply seeking confirmation of which of the two competing interpretations is the one that more closely comports with the view of a global community of reason and rights, looking to reasoned, enlightened views drawn from parallel experiences.

So I may not consider your views about this lecture to be binding, but I do want to know what they are, and I promise I will listen to your comments. If you make a point that causes me to reconsider, my analysis will be sharpened. As my predecessor as Yale Law School's Dean, Guido Calabresi, now in the Second Circuit once wrote, "Wise parents do not hesitate to learn from their children."⁸² By the same token, wise speakers do not hesitate to learn from their audiences.

Let me close with a final story from Kosovo. In 1999, after the NATO bombing, I went to Pristina, Kosovo's capital, to support the re-creation of judicial institutions. We brought to that war-torn country's abandoned courthouses equipment, computers, metal detectors, and computerized docket systems. But Kosovo lacked one thing necessary for the administration of justice—judges. The judges had all fled to refugee camps in Albania and Macedonia. By the time I arrived, the United Nations mission had gathered a group of lawyers from the old Kosovo and asked me, "Mr. Assistant Secretary, we would like you to swear these judges in."

But then the question arose, What do we swear them on? We could not swear them all on the Bible. Why? Because most of the Albanians were Muslims. Yet we could not swear them all on the Qur'an. Why? Because the Serbs were Serbian Orthodox. We could not swear them under Albanian law, because the Kosovars were not citizens of Albania. And we could not swear them under Serbian law, because the Kosovars deemed that to be the law of the oppressor. So what law must they follow? I turned to the waiting judges-to-be, and somebody said, "Mr. Secretary, you have to make a decision."

I said, "All right. Bring out a Qur'an, a Bible, the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights, and the European Convention on Human Rights. If they are going to be judges, all of them from different backgrounds, perhaps it makes sense that they swear an oath to a global community of reason and rights." And one by one, they took the oath. It was one of the most touching things I have ever seen.

Did they, after that, as judges, have interpretive authority over their own constitutional law? They surely did. Were they unfettered in exercising their judicial authority? Absolutely not. Were they construing only domestic law? They were construing domestic law in reference to the *jus gentium*. It would have been anachronistic in that case to adhere solely to

82. *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995).

domestic law. After all, they were entering a world where we all hoped that their similarities would be greater than their differences. We asked them to construe their law tempered by reason and with an awareness of rights. By that vehicle, they were authorized to declare law as part of their legitimate judicial function. The hope and expectation of every lawyer in that room was that Kosovo's new judges would build a body of law that would make them a respected member of the global community.

And, I thought, if this is good for the Kosovars, why doesn't it apply equally to us? When the Kosovars declare their independence, will they say, "We hold these truths to be self-evident, that all [persons] are created equal, . . . with certain unalienable Rights," among them "Life, Liberty, and the Pursuit of Happiness"?⁸³ Will they make reference to the body of human rights law that has developed since 1776? Will they say that in becoming independent, they will pay "decent respect to the opinions of mankind"⁸⁴ as part of joining the community of the law of nations? And will they learn the key lesson of the global human rights revolution, which is simply this: that we need domestic judges to participate in the making of a world governed by human rights by viewing their role, not only as citizens of their own particular country, but as part of a broader global community of reason and rights?

Thank you very much.

DEAN TREANOR: We will take two questions.

What a magnificent speech.

Martin Flaherty?

QUESTIONER: That not only made my day; it made my year.

I cannot bring myself to ask a devil's advocate question, so let me make this comment. Another objection to originalism—and I am not sure how much it complements or differs from yours—is that many of the Justices, including Justice Scalia, make their opposition to the use of international comparative law on originalist grounds: "We the people" did not want it. You have shown that that is wrong.

But even if we could not tell, there is another objection. It goes to the objection that international law and comparative law are too hard to follow. Basically, if that is true, how much more—

DEAN KOH: And ERISA is not?

QUESTIONER: And my point is: And the founding is not? You are trying to figure out what people 200 years ago said, discerning it from twenty volumes of ratification debates—pamphlets, history, whatever. Talk about picking and choosing, and trying to find your friends or not.

Why is that okay—in fact, not only is that okay; that is dispositive—but looking to international sources for confirmation or, at most, a kind of *Charming Betsy* tiebreaker is unthinkable? I do not see how the same

83. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

84. *Id.* para. 1.

judicial mind can have both thoughts at once: History is dispositive, but international law cannot be consulted at all.

DEAN KOH: John Hart Ely has two books that a lot of people have read, *Democracy and Distrust*⁸⁵ and *War and Responsibility*.⁸⁶ But there is a third book that came out not long before he died, which is called *On Constitutional Ground*.⁸⁷ I love John Hart Ely. I love the way he writes. But the great thing about *On Constitutional Ground* is that it actually put together a lot of little essays he wrote. One of them was a speech he gave in Canada at the exact time that he was writing the chapter of *Democracy and Distrust* on how you discover fundamental values in the Constitution. He says, "Do judges in the United States find fundamental values the same way the Canadians do?"⁸⁸

He started talking about originalism and arguments from tradition. He said that the problem with these arguments from tradition and originalism is that one side says, "You know, gays can't commit sodomy." Why? "Because our originalism is all about heterosexuality." But the obvious response is, "There is a tradition in America, more than in other countries—because the United States is a secular society—of sexual freedom." Therefore, people in the United States do all kinds of things as part of a tradition of liberal sexual freedom. So you could invoke "tradition" to cover either side of this equation. From which Ely concludes that, since originalism and tradition are malleable, and since there must be some method by which you accept or reject certain practices, like lynching or preventing black people from voting, as part of the tradition to which we give respect, you actually need some filtering principle.

What I am offering here is a simple principle, which is that you look to those traditions that pass muster within a global community of reason and rights. In fact, that is what our Court has been doing for many years. Some of my colleagues, Akhil Amar, Jack Balkin, and other scholars say, "What about progressive originalism? Maybe we should think of originalism as an evolving, not a static, originalism." In *Trop v. Dulles*, when the Supreme Court said that the Eighth Amendment shall be construed according to "evolving standards of [human] decency,"⁸⁹ it was adopting a standard that it thought was originalist; it just happened to include a bar on punishments that were "cruel and unusual" by contemporary standards.

QUESTIONER: First of all, this is incredibly inspiring.

But there is a difference, it seems to me, between the world now and the tradition of this, even in American law. I think that there are fewer lawyers and judges educated in these things before they have to make decisions

85. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

86. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

87. ELY, *supra* note 72.

88. *See id.* at 18–24.

89. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

based on them. You see this with some of the war on terror decisions. There are canons of interpretation in international law that are just the ones from American law used on different texts. These sources actually come with traditions in which there are many fewer people educated now than used to be the case in the United States, I think.

So that is one kind of problem.

The other kind of problem is that many of the sources that would be extremely useful are, of course, not in English. I think many people in the United States speak relatively few languages, and there is relatively little translation being done of decisions of some of the key comparative law courts that we might want to look at.

So there is a kind of education issue here, about whether these sources are really as accessible as they used to be, I think. When you look at how foreign and international law were used by previous judges, a lot of them knew a lot more.

This could be a dean question about what we do about legal education. But it could also be a question about what kinds of sources can be used if, in fact, not all of those using them may be fully educated in the traditions thereof.

DEAN KOH: The first point strikes me as a self-fulfilling prophecy: Because our judges are uneducated about these matters, they cannot be trusted to look at foreign and international law, which vindicates being uneducated. That was, by the way, an argument frequently made for application of the political question doctrine. Judges do not know anything about politics, so they should never decide the cases that include political questions. Then, when they never decide such cases, they will never know anything about them. Therefore, they must be nonjusticiable political questions—even when the words involved in such cases are terms fully subject to legal analysis, like “war” or “national emergency.”

When you and I went to law school, it may be that few of the law schools in America were aggressively teaching international law or transnational law. But is that the case now? Is there any law student in this country who does not communicate internationally every day by sending messages through the Internet? My view on this is, maybe we are catching up. What the war on terror taught us was that not that many people knew about humanitarian law, as opposed to human rights law. But now they do. Americans now know about humanitarian law. Everybody in the country has heard about the Geneva Conventions now.

On the accessibility question, it is true that English is the universal language. That happens to be our language. Can somebody realistically say that it is harder for us now to translate foreign law than it was for John Marshall at the beginning of the Republic? In fact, it is infinitely easier, more accessible and more available. People of reason and people who write about rights—including constitutional court judges—now regularly put their writings online, and in English.

So I think the opposite is actually true. Technologically, foreign and international law are far more accessible now than they were in the past. Is there any significant tribunal in the world that is not putting its decisions online in English? So the notions that we cannot know or find this foreign law no longer hold water, particularly the more we have conferences like this one.

DEAN TREANOR: That's terrific. Thank you very much, Dean Koh, for a fabulous talk.

Notes & Observations